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IN THE

Supreme Court of the United States

October Term, 1964. No. 999

JULIUS GODENY and MARY GODENY,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO ISSUE TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Julius Godeny and Mary Godeny, his wife, Petitioners, by their Attorney, Robert M. Taylor, Esq., pray that a Writ of Certiorari be allowed to issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on December 21, 1964.

STATUTES INVOLVED.

Statute: June 25, 1948, C. 646, 62 Stat. 928, 28 U. S. C. A. 1254(1).

This section provides:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; * * *"

Constitutional Amendments:

The Fifth Amendment to the Constitution provides, " . . . no person shall be deprived of life, liberty or property without due process of law".

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Rule 52(a) provides, inter alia, " * * * Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness, * * *".

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Third Circuit entered December 21, 1964, is reported in 339 F. 2nd 262. A copy of its Opinion appears in the Appendix at page 2a.

The Opinion of the Tax Court of the United States entered December 12, 1963, is reported in 22 Tax Court Memorandum 1694. A copy of said Opinion appears in the Appendix for Petitioners, filed with the Court of Appeals at pages 182(a) and 195(a) respectively.

JURISDICTION.

The jurisdiction of this Court is involved under Act of June 25, 1948, C. 646, 62 Stat. 928; 28 U. S. C. A. Section 1254(1).

The Order and Judgment of the United States Court of Appeals for the Third Circuit was entered on December 21, 1964. A copy of same appears in the Appendix at page 2a.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in not finding the Tax Court's Findings of Fact clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure?

2. Did the Appellate Court msinterpret, misconstrue and misapply the law as set down by the Supreme Court in the case of *Holland vs. United States,* pertaining to net worth income tax cases?

3. Did the Court of Appeals err in affirming the Tax Court's Finding of Fraud for each of the years involved herein?

4. Did the Appellate Court and Tax Court's decisions work a clear injustice upon the taxpayers; and were they clearly unfair and arbitrary?

5. Were the Tax Court's Findings so against the great preponderance of the credible testimony and the Appellate Court's decision upholding them, that they do not reflect or represent the truth and right of the case?

STATEMENT OF THE CASE.

The Respondent, Commissioner of Internal Revenue, determined deficiencies in income taxes and additions to the tax against the Petitioners, first for the calendar years 1956, 1957 and 1958, and sometime later for the years 1953, 1954 and 1955, basing his cases on the net worth method of proof.

The Petitioners filed Petitions in the Tax Court of the United States protesting and contesting the said determinations. The two cases were consolidated for trial and were heard by Tax Court Judge John E. Mulroney on May 23, 1963. The evidence consisted of stipulated facts and exhibits appended thereto, a supplemented stipulation of facts, a second supplemental stipulation of facts and exhibits appended thereto and oral testimony and exhibits at the trial. Briefs were filed with the Tax Court by all parties concerned and in due course of time on December 12, 1963, the Honorable Tax Court Judge filed his Memorandum Findings of Fact and Opinion.

In said Opinion the Tax Court found that the Respondent had not proven fraud against the Petitioners for the years 1953, 1954 and 1955, and therefore, if any deficiencies were due, they were barred by the Statute of Limitations. As to the latter period the Tax Court found that deficiencies were due as well as fraud penalties (N. T. 187a).

On January 24, 1964, the Petitioners filed with the Tax Court a Motion for the Court to reconsider and reopen the case and to revise its views and Findings under Rule 19 of the Tax Court, with Exhibits attached thereto. The Court denied the Petition on January 28, 1964.

On February 20, 1964, the Tax Court Decision was entered.

As allowed by the Tax Court Rules the Petitioners filed, on March 17, 1964, a Motion for a Review of the Court's Opinion and Decision by the Full Court, because of the clearly erroneous results in the Findings of Facts, and in the open and clear conflict of mathematical reasoning as finally obtained in the Opinion, together with Exhibits.

Said Petition was denied on March 23, 1964.

On April 2, 1964, Petitioners filed their Petition for Review of the Tax Court with the United States Court of Appeals for the Third Circuit.

The case was argued before the Court of Appeals on December 11, 1964, and on December 21, 1964, the Court filed its Opinion, Order and Judgment affirming the Decision and Opinion of the Tax Court.

Wherefore, Petitioners file this their Petition for allowance of a Writ of Certiorari to issue to the United States Court of Appeals for the Third Circuit.

It is the Petitioners' contentions that under the decisions of this Honorable Court (*Holland v. U. S.*) the Court of Appeals for the Third Circuit erred in that it failed to return the case to the Tax Court to make a proper finding as to the existence of some "cash on hand" at the Respondent's net worth starting point in view of the uncontradicted evidence submitted by the Petitioners respecting a stated amount of cash on hand instead of "Zero Cash."

Further, the Court of Appeals erred in that it sustained a finding of fraud for each of the years involved herein as made by the Tax Court, when in fact proof of same was completely [illegible] as measured by the decisions of this Honorable Supreme Court. That it has not adhered to its set out guides and essentials of the net worth theory.

Petitioner, Julius Godeny, was engaged mainly in the automobile business operating Chevrolet Agencies during the years 1956, 1957 and 1958, with the exception of the period November 30, 1956 to October 1, 1957, when he was

out of business and constructing a new building. Most of the cash fund on hand was used to pay the costs of construction of the new building in 1957.

Among the Appellate Court's errors the petitioner submits it erred in affirming such alleged deficiencies and additions thereto; the finding of fraud, the disallowance of a properly deducted loss taken in 1956.

REASONS FOR ALLOWANCE OF THE WRIT.

It is believed that the questions involved herein are of great national importance far beyond the particular facts and parties involved herein and are vital in administration of the Federal Tax Laws; and it is therefore greatly vital that they should be decided finally by this Honorable Supreme Court; settlement of the questions by this Court is plainly in the public interest, and it is likely to be cited and used in future Net Worth tax cases including many now pending.

The questions involved herein relate to the proper uses by the Government in Net Worth income tax cases, as stated by this Court in the case of *Holland v. United States*, 348 U. S. 121, 99 L. Ed. 150, 75 S. Ct. 127, and in its companion cases of *Friedberg v. United States*, 348 U. S. 142, 99 L. Ed. 188, 75 S. Ct. 138; *Smith v. United States*, 348 U. S. 147, 99 L. Ed. 192, 75 S. Ct. 194, and *United States v. Calderon*, 348 U. S. 160, 99 L. Ed. 202, 75 S. Ct. 186. It is assumed that those rules are applicable to civil cases as well as criminal tax cases.

This Honorable Supreme Court, in the Holland case, set out numerous guides, pitfalls, and precepts for the prosecution and defense in Net Worth cases. Some of those being referred to herein are as follows:

(A) In its Opinion it states (p. 125) that the net worth method is so fraught with danger for the innocent that the Courts must closely scrutinize its use;

(B) "Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention. However, taxpayers do encounter many obstacles in convincing the jury of the existence of such hoards. This is particularly so when the emergency of the hidden savings also uncovers a fraud on the taxpayers' creditors" (p. 127).

(C) "In this connection, the taxpayer frequently gives 'leads' to the Government Agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritance, gifts, etc. Sometimes these leads point back to old transactions far removed from the prosecution period. Were the Government required to run down all such leads, it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer."

(D) In many cases of this type, the prosecution relies on the taxpayer's statements, made to revenue agents, in the course of their investigation, to establish vital links in the Government's proof. But where a revenue agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth. Moreover, the prosecution may pick

and choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position. The problem of corroboration, dealt with in the companion cases of *Smith v. United States*, infra, and *United States v. Calderon*, p. 202, therefore becomes crucial.

(E) The Statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution years. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent.

(F) "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The complexity of the problem is such that it cannot be met merely by the application of general rules. cf. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 489, 95 L. Ed. 456, 468, 71 S. Ct. 456. Trial Courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions upon which it rests and the inferences available both for and against the accused. Appellate Courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

(G) "We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." * * *

(H) " * * * its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

(I) Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net

worth increases are attributable to currently taxable income."

With the above considerations as guides, the petitioners herein submit to this Honorable Court that the Tax Court and Court of Appeals did not heed or follow the said guides or yardsticks, and that their decisions are in direct conflict with this Supreme Court's decision in the *Holland* case.

The Appellate Court and lower Trial Court did not give the petitioners any credit for "cash on hand" in the starting point of the respondent's net worth schedule as of December 31, 1955, although the record is replete with proof of their having had cash on hand as of December 31, 1955. The said Courts have made a very unrealistic approach to this item. They have allowed the Commissioner of Internal Revenue to emphasize the items that favor him and to ignore items which are not favorable to his position, particularly, the cash on hand. This Supreme Court has laid down the test of reasonable certainty of the starting point in net worth cases, but the Appellate Court herein has not apparently given consideration or heed to same, thereby being in error.

Although the Petitioners gave many leads to the Revenue agents, they failed to run them down and prove or disprove such leads. Such an investigation of said leads could have only led them to one conclusion and that is the Petitioners must have had "cash on hand" at the starting point. Here again the Appellate Court has strayed from consideration of this Supreme Court's guides and by doing so has committed error in violating such precepts.

Several Circuit Courts of Appeals have held that a deficiency based upon zero cash at the beginning of the net worth period may not be sustained where the evidence is equally consistent with some cash even though the taxpayer does not prove any specific amount.

The disallowance of said "cash on hand" is a crucial error of omission. As is well known a common unknown factor in net worth cases is "cash on hand" as distinguished from "cash in bank." If believed, "prior accumulated cash" may destroy the validity of the Government's increase in net worth supposition in that the taxpayer is in a position to urge that his expenditures in later years were made possible not from current and undeclared income, but from his accumulated cash hoard earned in years prior to those involved."

The Commissioner of Internal Revenue did not prove, with reasonable certainty and accuracy, petitioners' correct net worth at the starting point thereof, nor did he prove that they had any additional income to any specific year involved herein. However, the lower court upheld his determinations but erred in doing so.

The Appellate Court and Tax Court erred in not finding that the Commissioner of Internal Revenue had not proven the Petitioners had a likely source of income for the alleged additional income.

There is, therefore, in this matter, and which call for redress, conflicts in principles and in the application of this Supreme Court's rule of law, erroneous rulings on the facts; incorrect decisions; conflicts between different Circuit Courts of Appeals, and a gross miscarriage of justice.

ARGUMENT.

1 to 5. A careful perusal of all of the facts concerning this matter clearly indicates that the Appellate Court erred in not finding the Tax Court's Findings of Fact clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure; and in affirming the Tax Court's Finding of Fraud for each of the years involved herein.

The Petitioners submit that the net worth increase shown by the Respondent's statement is in reality not an increase at all, because of the existence of substantial cash on hand at the starting point. This sum was made up of savings and gifts and kept mostly at the Petitioners' home in a safe kept by their family for many years prior thereto; and this sum being used up in years 1956, 1957 and 1958 in the building.

Evidently, if the Petitioners did in fact possess the amount of cash on hand they claim they had, as of December 31, 1955, and which was used up during the involved period, the Respondent's determination that their amount of said cash on hand at that date was ZERO is not true. Since a zero net worth determination, as to cash on hand, is the basis of the tax deficiency in question, disproof of the correctness of the Respondent's determination destroys the foundation upon which the Respondent's case rests.

Petitioners submit that they produced at and during the trial of the matter more than sufficient evidence that they did possess such sum of $95,000.00 on December 31, 1955, the starting point of the Respondent's net worth period. This Court is requested to take judicial notice that it is a matter of common knowledge concerning many of our

European immigrants of various nationalities who come to this country that an inclination to save and hoard cash currency is not an uncommon trait among them; that they often engage in successful and lucrative businesses; and that many of them succeed therein. (See *George Descos*, 20 P-H. T. C. Memo. 210.) Evidence of the existence of petitioner's cash fund is as follows:

Julius J. Godeny, hereinafter called the Petitioner, sold his Chevrolet automobile business as of November 30, 1956, to his son-in-law, Gene Kayler. He sold to him his inventory (approximately $45,000.00) of cars, at cost, to be paid for them as they were sold. Most of them were sold by Mr. Kayler in 1957, who in turn paid Mr. Godney his selling price of same. Mr. Godeny had reported these sales in his 1956 income tax returns so that any moneys coming from them in 1957 would be a source of non-taxable funds (N. T. 149(a), 150(a), 152(a) and 179(a)).

Although Mr. Godeny was out of business from November 30, 1956, to October 1, 1957, he made cash currency deposits in his bank accounts of $25,000.00 on May 27, 1957, $2400.00 on August 6, 1957, and $29,000.00 on August 12, 1957, and $24,000.00 cash paid to General Motors Acceptance Corporation on June 19, 1957, also used later for the new building costs. Second Supplemental Stipulation and Motion to Reconsider with Exhibits 4-10.

Practically all of these funds were used up in 1957 for the new building costs. A perusal of his business bank accounts and business financial statements (N. T. 207a) as of December 31, 1957, corroborates the same.

Petitioner not being in business during the month of December, 1956, and the first nine months of 1957 proves and renders it unlikely the automobile business could account for the unexplained net worth increases. The Respondent has not questioned his income from loans, investments and real estate, which were not, in toto large enough to build up

these cash deposits. The proof of the absence of taxable sources of receipts or funds results in the reasonable inference that the net worth increase had to come from his "saved-up cash" prior to 1956. Petitioner deposited $14,000.00 in the Godeny Chevrolet Agency account in 1956 as a loan. See 1956 and 1957 Financial ~~Stipulations~~ Statements (N.T. 206-

Other cash currency used in 1957 by the Petitioner in his new building costs was the cashing of a $10,000.00 check for one of the sub-contractors, on April 11, 1957. He also used up several thousands of dollars of cash currency in cashing other sub-contractors' checks (all of such cash not being withdrawn from a bank account). See Motion to Reconsider by Tax Court Exhibits 2 and 3.

It is interesting to note that the Respondent in his net worth schedule for Loans Receivable in 1955 of $34,299.15, includes therein the sum of $16,000.00 owed by Steve Wargo. This is the money Mr. Wargo testified he borrowed from Petitioner on December 9th, 1954, when he and Mr. Konya and Petitioner counted the $76,000.00. The Respondent has seen fit to allow him the $16,000.00 so testified to, but does not recognize the Petitioner had the $76,000.00. This is certainly an illegally illogical position, as well as affecting the Respondent's net worth statement. Mr. Wargo's bank deposit slip showing a cash deposit of $20,000.00 on December 10, 1954, was introduced into evidence (N. T. 47a) (Exhibit 1, Motion to Reconsider).

The Respondent originally set his case up against the Petitioners for the years 1956, 1957 and 1958, but after they had turned over to him voluminous proof to disprove his case he then added the years 1953, 1954 and 1955, also using the net worth method. The Tax Court Judge found no fraud for these first three years, and therefore, as there were no waivers executed for them, such deficiencies, if any, were barred by the Statute of Limitations. The Honorable Judge states at the beginning of his Opinion (N. T. 195(a)),

"Respondent, in his statutory notice of deficiency, computes petitioner's unreported income for the years 1953 through 1958 under the net worth method as follows: $43,067.45, $11,952.16, $11,795.96, $40,259.05, $143,411.40 and $22,085.77 respectively. After the stipulation by the parties of all times except cash on hand as of December 31, 1953 through 1958, the Reserve for Depreciation—Real Estate for the years 1957 and 1958, and the disallowed loss on the sale of inventory and equipment by petitioner to his son-in-law in 1956, the petitioner's unreported income, as determined by the respondent's net worth method for the years 1953 through 1958 was as follows: $13,292.71, $19,925.37, $10,-395.96, $2798.03, $57,025.04 and $13,388.82."

These stipulated reductions by the Respondent should by themselves be enough to overcome any presumption of correctness of the Respondent's determination. The said Judge erred when he referred to stipulated cash on hand as of December 31, 1953. It actually was and had to be December 31, 1952, as shown in the net worth schedule (193a).

The Respondent therefore accused the Petitioner of having unreported the total sum of $43,614.04 for the years 1953, 1954 and 1955.

The Tax Court Judge further states (N. T. 200a, lines 22 to 3), " * * * The Record also shows that petitioner sold his Nash Agency in 1952, just before the start of the period before us, and acquired a Chevrolet Agency. We might readily speculate that any understatement of income for the years 1953-1955 were produced by lack of familiarity with the new accounting system (required by General Motors Corporation) or, perhaps, by an honest ineptitude with the books and records. However, we need not speculate. It is enough to state that, on the record, we are not satisfied that respondent has not shown fraud for the years 1953-1955 in clear and convincing manner."

Here the Respondent and Tax Court, itself, has set up a source of funds (non-taxable in 1956, 1957 and 1958) that could have given Petitioner a cash fund available for use in years 1956, 1957 and 1958.

Petitioner's witnesses Spreckelson and Egresi testified they had seen Joseph Lacsik, Petitioner, Mary Godeny's father, give Julius Godeny sums of money at various times (N. T. 34(a) to 38(a), N. T. 39(a) to 43(a)).

The Petitioners have referred to all of the above evidence, mostly documented, to convince this Honorable Supreme Court that the Appellate Court has erred in disaffirming same, creating a great injustice to the Petitioners. It, of course, also evidences the fact that by giving the Petitioners "zero cash" in his starting point, the Respondent was in great error which the Tax Court and Appellate Court should have recognized and disallowed. The Petitioners believe and therefore contend that such findings are violations of his constitutional rights as provided by the Fifth Amendment thereto regarding "due process" and "equal protection of the law." *Demetree v. United States*, 207 F. 2d 892, 894.

When a taxpayer makes a substantial investment or expenditure of funds at or soon after the opening of the taxable year, there is strong support for an inference the cash was on hand as of the beginning of the period. *Harry Gleis*, 24 T. C. 941 (1955), affd. 245 Fed. 2d 237.

The obvious implication is that the taxpayer could not possibly have earned income in substantial quantities so early in the tax year and must have received the funds earlier. This inference is further strengthened when it is demonstrated the taxpayer's business could not possibly have accounted for the expenditures.

The taxpayer's explanation of cash on hand was not evasive, his attitude was good and his explanation was corroborated by other witnesses and documents. The tax-

payer proved that he was not in business from November 30, 1956, to October 1, 1957, and he had no undisclosed business or source capable of producing taxable income. The Respondent did not produce proof of any likely source from which the courts could have reasonably found that the net worth increases sprang. The petitioners' private expenditures never exceeded their available declared income and resources. The element of willfulness or fraud was not present and the Respondent did not show any specific intent by Petitioners to evade payment of income taxes by any independent evidence. There was no consistent pattern of under-reporting large amounts of income nor was there any proof that Petitioner did not include all of his taxable income in his books and records. The Respondent never did negative all possible sources of Petitioners' nontaxable income.

The Petitioners filed good returns, paid substantial taxes and had substantial depreciation. They made loans to others, bought and sold mortgages and real estate and dealt in cash. All of which points to the great possibility of having a cash "hoard." The Respondent gave no substantial testimony as to why he did not allow Petitioners any "cash on hand" at the starting point of each year involved.

It is again submitted, therefore, that the Respondent's alleged unreported taxable income indicated by his net worth calculations is inaccurate because the Respondent's evidence is insufficient to show the accuracy of his net worth figures. The Respondent has failed to bring forth sufficient evidence to substantiate the figure which he contends represents the Petitioners' total assets at the beginning of the period during which they are alleged to have evaded taxes, and this failure should bar a court from finding that amounts characterized by the Respondent as net worth increases were necessarily attributable to unreported

taxable income, and not to assets possessed by the Petitioners from the outset.

The Petitioners submit that the Appellate Court erred in not taking into its consideration the Petitioners' proven "way of life," as evidence of their having "cash on hand" and significant evidence of their affluence and of having a good credit rating. Both of the financial statements given by Mr. Godeny clearly demonstrate a showing of wealth.

The Petitioners were and are very frugal and for many years before the tax period involved lived with Mrs. Godeny's parents free of expense which gave them an opportunity to save. They maintained two bank safe deposit boxes and made frequent trips to them; they accepted cash from others for purchases of real estate and mortgages. They were in the habit of making loans in cash and being repaid in cash. Mr. Godeny also had the proceeds from the sales of his automobile businesses. All of this was known to the Revenue agents during their investigation of Petitioners but they did not see fit to follow up these leads, or at least, have not testified that they did.

On many occasions, in the trials of income tax cases based upon net worth, the courts have criticized the taxpayer for not producing witnesses who saw his "alleged cash hoard" or for witnesses who should have known of same, not knowing. Here, in the Godeny case, the taxpayer petitioners in their Tax Court trial produced disinterested third party witnesses as well as members of his family who not only knew and heard of the cash left in his safe at home but actually saw the same and counted it, immediately prior to the involved tax period.

Disinterested third party witnesses were Kalman Konya, William C. Spreckelson and Mr. Egresi. Mr. Konya testified he was a friend of Steve Wargo and had accompanied him to the Godeny home on December 9, 1954, when he saw Mr. Godeny with a large amount of cash from which he

gave $16,000 to Mr. Wargo and counted $60,000 as the balance still remaining (N. T. 50a-53a).

William C. Spreckelson testified he worked for Mr. Lacsik, Mrs. Godeny's father, and saw him, at various times, give him rolls of cash (N. T. 34a-38a).

Mr. Egresi testified in the same manner (N. T. 39a-42a).

Steve Wargo, as previously mentioned, testified that he had on December 9, 1954, gone to Julius Godeny's home accompanied by Mr. Konya to borrow $16,000 from his uncle with which to buy an auto franchise. That Mr. Godeny had $76,000 in cash currency at that time. Also, all during his earlier lifetime he had visited their home and the Lacsik home where the family safe was located and had seen the money taken out of the safe on different occasions (N. T. 43a-49a).

Other members of the family testified to Mr. Godeny having the cash at home and in his safe deposit boxes. Mrs. Mary Godeny, his wife, so testified, as did his daughter, Mary Kayler, his son, Elmer Godeny, Elmer's wife, Jean, and her mother, Elsie Randell. All of these people are good people, religious and morally of good character. The Respondent never once contradicted these witnesses but nevertheless the Tax Court Judge found their testimony should not be given much credence. That their bias was obvious. That he had examined their testimony and found it not plausible and not at all persuasive. Petitioner asks the question, "Who if anyone should know of his having cash in the house if it were not his wife and children?" Such a holding of the Tax Court, affirmed by the Appellate Court in error, forecloses any taxpayer in the future from bringing any witnesses into the Tax Court to prove cash on hand which generates into a constitutional violation of a taxpayer's rights.

Petitioners contend the Tax Court Judge badly erred in so pushing aside their testimony; and that the Court of Ap-

peals committed reversible error in upholding same. It is argued that the Courts' action was unjust, unfair and against the evidence and weight of same.

FRAUD.

Petitioners submit that there were no proven acts of fraud committed by the Petitioners. The Tax Court Judge refers to indicia of fraud but none of such is based upon any real, competent evidence. The Petitioners never at any time had the purpose or intention of evading payment of income taxes.

Certainly the Jolley car transactions were not fraudulent nor were the exaggeration of the building costs. Reference to Petitioners' omissions to report small amounts of income or gain from insurance policies and sales of Government bonds are "de minimis" and actually discloses how weak the Respondent's case is.

If the Tax Court Judge had allowed the Petitioners' loss in 1956 as taken in their 1956 Tax Return and which was a proper and lawful deduction, there would be no tax due for 1956. Even Revenue Agent Scannell testified that in his opinion there wasn't anything wrong with the Godenys' Tax Return for 1956 (N. T. 154a).

Petitioners contend the Tax Court's Findings of Fraud for each of the years involved herein were clearly erroneous and reviewable by the Appellate Court; and that the Appellate Court erred in affirming the Tax Court's Findings of Fraud.

As is well known, the burden of proof is on the respondent to prove fraud. It is never presumed and proof of it must be made by clear and convincing evidence, showing actual and intentional wrongdoing on the part of the tax-

payer with specific intent to evade tax. See *Holland* supra; and the fact that Respondent has determined a greater tax liability than reported, even if sustained, does not of itself establish fraud. "*Edwin Abraham,* T. C. Memo 1962-160," "an intent or purpose to evade tax is essential."

The Petitioners' proof of a large amount of cash at the beginning of 1956 shows error and ruins Respondent's determination of tax and fraud because a reasonable, accurate beginning point is a "must" and a "prerequisite" to the use of the net worth method.

The Appellate Court finds that the issues raised in Petitioners' appeal are purely factual and that there was substantial evidence to support the findings. To this, the Petitioners disagree. They contend that the Appeals Court erred in so finding; that there were legal issues involved therein concerning not only the law of the case, but in the manner, treatment and interpretation and construing of the facts by the Tax Court. That the case was clearly reviewable under Rule 52(a).

This Supreme Court is further requested to consider the correctness and lawfulness of the Respondent's, Tax Court's and Appellate Court's yearly allocation of additional income, taxes and fraud.

What they have done is to place taxable income in years, particularly years 1956, 1957 and 1958, far in excess of the potential income producing capabilities of the taxpayer during that period.

The danger of misallocation is great in net worth cases. There must be a certainty to the year in which the additional unreported income is alleged to have been received. This Court, in the *Holland* case opinion generally recognized this danger, where there is no reasonable allocation of a steadily increasing net worth to the appropriate tax years. In civil income tax cases the allocation problem is

acute because the exact dollar amount of the tax deficiency must be determined.

Also, whereas the Government's (Respondent's) mathematical approaches might be sufficient in ordinary deficiency cases, they are of doubtful value where the Respondent Commissioner has made a determination of fraud in circumstances casting grave doubts upon the correctness of his action, since each year is a separate taxable unit, the additions to the tax cannot be spread over a period of years on a purely mathematical basis for the purposes of the fraud penalty or for the proving of fraud. In some cases the courts have held that the increases in assets may have occurred entirely in one year and the fraud might have been consummated solely in that year. Where the issue is fraud, we cannot assume that such fraud occurred in each of the years in issue rather than solely in one. See *W. A. Shaw*, 27 T. C. 561 (1956), aff. 252 F. 2d 681.

The Petitioners respectfully submit and contend that the lower Court's action worked a clear injustice upon them. That the force and effect of the testimony and evidence herein, considered as a whole, is so clearly convincing toward Petitioners that the Tax Court and Appellate Court's findings are so against the great preponderance of the credible testimony that they do not reflect or represent the truth and right of this case, and violate this Supreme Court's holdings in the *Holland* case.

That unquestionably the Tax Court's Findings of Fact were clearly erroneous as was its interpretation and application of them. The two lower Courts have misapprehended the effect of the evidence and their findings are without substantial evidence to support them. The Court of Appeals should have exercised its powers under Section 52(a) and found that the Tax Court's findings of Fact and Conclusions of Law were clearly erroneous and found in

favor of the Petitioners. But in not doing so it has committed reversible error.

The Petitioners refer to their Brief filed with the said Court of Appeals and by such reference incorporate it as part of their Petition For Certiorari.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons and in the interest and pursuit of equity and justice, the Petition For Writ of Certiorari should be granted by this Honorable Court. That the charging of Petitioners with tax deficiencies and penalties of close to $75,000.00 plus interest is improper, unlawful, unfair and unjust.

It is certified that this Petition is not filed for delay.

WHEREFORE, Petitioners pray that a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT M. TAYLOR,
Attorney for Petitioners.

Appendix

OPINION OF THE COURT.

(Filed December 21, 1964.)

PER CURIAM:

The petitioners here seek review of a decision of the Tax Court determining deficiencies in their income tax liability for the years 1956, 1957 and 1958 and upholding fraud penalties added by the Commissioner for each of those years. The issues raised on review are purely factual, the petitioners urging us to set aside the crucial findings of the Tax Court as clearly erroneous. Our examination of the record satisfies us, however, that there is substantial evidence to support the findings. We see no reason to add to the discussion of the evidence contained in Judge Mulroney's opinion with which we are in full agreement.

The decision of the Tax Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

December 21, 1964.